

EXHIBIT 33

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF TENNESSEE
3 - - - - -
4 ULTIMA SERVICES CORPORATION,
5 Plaintiff,
6 No. 2:20-cv-00041-DCLC-CRW
7 -against-
8 U.S. DEPARTMENT OF AGRICULTURE, U.S.
9 SMALL BUSINESS ADMINISTRATION, SECRETARY
10 OF AGRICULTURE, and ADMINISTRATOR OF THE
11 SMALL BUSINESS ADMINISTRATION,
12
13 Defendants.

14
15 March 7, 2022
16 10:03 a.m. (EST)

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DEPOSITION of Dr. Jon Wainwright, the
Expert Witness in the above-entitled
action, held at the above time and place,
taken before Garry J. Torres, a
Stenographer and Notary Public of the
State of New York, pursuant to the Federal
Rules of Civil Procedure, Notice and
stipulations between Counsel.

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1 APPEARANCES :

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3 CENTER FOR INDIVIDUAL RIGHTS
4 Attorneys for Plaintiff
5 ULTIMA SERVICES CORPORATION
6 1100 Connecticut Ave, NW
7 Suite 625
8 Washington, D.C. 20036
9 TEL: (202) 833-8400
10 EMAIL: scott@cir-usa.org
11 BY: MICHAEL E. ROSMAN, ESQ.

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14 CHRISTINE DINAN, ESQ.

15 Attorneys for Defendants

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17

18 ALSO PRESENT:

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21 MICHELLE SCOTT
22 ANDREW BRANIFF
23 K'SHAANI SMITH
24 JULIET GRAY

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STIPULATIONS

2 IT IS HEREBY STIPULATED AND AGREED, by
3 and among counsel for the respective
4 parties hereto, that the filing, sealing
5 and certification of the within deposition
6 shall be and the same are hereby waived;

7 IT IS FURTHER STIPULATED AND AGREED
8 that all objections, except as to form of
9 the question, shall be reserved to the
10 time of the trial;

11 IT IS FURTHER STIPULATED AND AGREED
12 that the within deposition may be signed
13 before any Notary Public with the same
14 force and effect as if signed and sworn to
15 before the Court.

* * *

1 A. 4109 Avenue F, Austin, Texas
2 78751.

3 Q. How old are you, sir?

4 A. 58.

5 Q. And you're now retired; is that
6 right?

7 A. Semi-retired, yes.

8 Q. Maybe you could describe for us
9 what semi-retired is --

10 A. I retired --

11 Q. -- and how I can aspire to it?

12 A. I retired from NERA National
13 Economic -- NERA Economic Consulting in
14 2018, the end of 2018, but as obvious from
15 today I'm still doing some consulting work
16 occasionally, but mostly retired.

17 Q. Okay. There's a number of
18 articles on your CV. Have any of them
19 been published in peer review journals?

20 A. I don't believe so. Is there
21 any in particular you're referring to?
22 But I don't believe so.

23 Q. Okay. So you -- in 1995 started
24 as a consultant at NERA; is that right?

25 A. Yes.

1 Q. Okay. That doesn't study
2 availability in the same kind of way that
3 the NERA studies of government contracting
4 did though; is that right?

5 A. I wouldn't say that's right.

6 Q. Okay. Tell me why you think the
7 study of survey evidence is the same as
8 the study of availability and utilization
9 that NERA did for government entities?

10 MS. DINAN: Objection.

11 Mischaracterizes previous testimony.
12 You can answer.

13 MR. ROSMAN: Okay.

14 Q. You can try. Go ahead.

15 A. The SBO data, for example, gives
16 you the entire universe of businesses in a
17 given geographic or industrial division.
18 It also identifies the number of
19 minority-owned businesses in that -- in a
20 given division and that is -- that's a
21 census of businesses and the one number
22 into the other is, in fact, an
23 availability statistic.

24 Q. Right. But it relies on survey
25 evidence, right?

1 you did not yourself test for statistical
2 significance?

3 MS. DINAN: Objection.

4 Foundation.

5 Q. Okay. Let's start again then.

6 MR. ROSMAN: That's fair.

7 Q. So if we go back to page 21,
8 which you were reading from previously,
9 the first bullet below the first part --
10 two lines of text refers to statistical
11 significance testing for disparity
12 indexes.

13 As I understand it from your
14 testimony and from reading your report, a
15 specific record would get coded as
16 statistically significant only if the
17 underlying study said it was statistically
18 significant; is that right?

19 A. Only if the underlying study
20 included a test for statistical
21 significance.

22 Q. Right.

23 A. So yes.

24 Q. I think we're saying the same
25 thing?

1 A. I think so.

2 Q. Okay. And do you have some
3 estimate as to what percentage of the
4 records that you viewed had an entry for
5 statistical significance?

6 A. Maybe roughly a fifth to a
7 quarter of the total.

8 Q. Okay. If there was a test for
9 statistical significance and the
10 underlying study concluded that the
11 specific disparity number was not
12 statistically significant, would that be
13 coded in the record by you?

14 A. Yes.

15 Q. So the 20 to 25 percent number
16 is the number where there was a test for
17 statistical significance regardless of
18 whether the number was statistically
19 significant; is that correct?

20 A. I believe that's right.

21 Q. So of the 20 to 25 percent, do
22 you have an estimate of how many of those
23 or what percentage of those were
24 statistically significant?

25 A. I believe that's what I tried to

1 A. I cannot as I sit here.

2 Q. The studies had various methods
3 of determining availability. Did you
4 review the underlying documents that went
5 into their availability calculations?

6 A. For the non-NERA studies, no.

7 Q. Did you do it for the NERA
8 studies?

9 A. Obviously.

10 Q. Oh, I meant in creating this
11 report in the last year, did you review
12 the availability --

13 A. No, I took them at face value.

14 Q. All right. I'm just going to
15 ask you a couple of questions about the
16 custom census approach that you've
17 identified on page 16 of your report.

18 So the first step is to create a
19 database of representative public
20 contracts and when you create that
21 database, do you actually take a sample of
22 the contracts? Is that what the word
23 "representative" is supposed to mean?

24 A. Not necessarily. That would
25 vary depending on the study in question.

1 for the city of Baltimore, we would ask
2 firms if they had tried or attempted to
3 try to work with the city of Baltimore in
4 the previous five years or other public
5 entities in the region. State of
6 Maryland, Prince George County, the
7 community college, what have you, the
8 private sector.

9 Q. And would you eliminate
10 businesses both minority and nonminority
11 from the study if their answers were they
12 hadn't really?

13 A. No.

14 Q. Why not?

15 A. It was just too subjective to, I
16 guess, to make that decision, an interest
17 in doing business can change from one year
18 to another. Firms that are -- I
19 just -- we did not do that. That was part
20 of our anecdotal survey just to gauge
21 interest in doing business.

22 But it was not something that we
23 used to restrict the statistic partly
24 because we had no good reason to believe
25 that that interest or should in a race

1 neutral market be any different between
2 the numerator and the denominator.

3 Q. Okay. Did you review how the
4 firms other than NERA did their
5 availability analysis?

6 A. For this report?

7 Q. Yes.

8 A. No, but I have in the past.

9 Q. Well, when you say you have in
10 the past, how far in the past and
11 what -- well, let's start with how far in
12 the past?

13 A. That was a principal subject in
14 the guidelines document that we did for
15 the National Academy of Sciences. It's
16 something we did in developing our own
17 approach to measuring availability to try
18 to take what we thought was the best and
19 most accurate approach to it.

20 And -- you know, one of the
21 other purposes of doing this metaanalysis
22 was to attempt to establish is despite the
23 fact that different consultants measure
24 availability quite differently from the
25 way NERA does, could we still draw any

1 market?

2 A. That's correct.

3 Q. So when NERA did it, they didn't
4 make any adjustment in the availability
5 statistic for the size of the business; is
6 that right?

7 A. That's right.

8 Q. To your knowledge, did any of
9 the underlying disparity studies that you
10 used in your report analyze utilization
11 only of those businesses that had been
12 specifically certified as minority
13 business enterprises as opposed to all
14 minority-owned businesses?

15 A. I'm not positive about that, but
16 it would not surprise me if there's some
17 that used just that approach.

18 Q. Okay. And that didn't concern
19 you that it might not have been getting
20 all of the minority businesses in a
21 particular market in their availability
22 statistics?

23 A. No. Because the purpose of this
24 report was to see what we could learn
25 across the entire universe of disparity

1 percent in a minority category just
2 looking at the first column, 55 percent
3 were large adverse and statistically
4 significant. So the other 45 percent
5 could have been large and adverse or some
6 of them -- a portion of them anyway but
7 just not statistically significant.

8 Q. Got it. All right. And so for
9 example, with Asian Americans fewer than
10 half of the large adverse disparities were
11 statistically significant, correct?

12 A. 47 percent.

13 Q. Okay. And just to close the
14 loop here, there were --

15 A. It's just similarly in the final
16 column the nonminorities is three percent.

17 Q. Yes. Right. If I can just go
18 back to -- so table 2.2 told us that there
19 were 4,327 overall observations in the
20 minority category, right?

21 A. Yes.

22 Q. And table 2.7 tells us that only
23 940 of those 4,327 had any information one
24 way or the other about statistical
25 significance; is that right?

1 A. Just slightly more than a fifth,
2 that's right.

3 Q. Slightly more than a fifth had
4 some information and of that 55 percent of
5 that 1/5 of the large adverse disparities
6 were statistically significant --

7 A. Yes.

8 Q. -- is that right?

9 A. I think that's right.

10 Q. Okay. Good. So what would you
11 say the relevant market is in this case?

12 MS. DINAN: Objection. Vague.

13 MR. ROSMAN: Okay.

14 A. Yeah, one of your earlier
15 questions and I -- seems to be that I'm
16 only interested in the plaintiff's market,
17 but I think what I was asked to do was
18 what conclusions can you draw in general
19 across markets, across geographies from
20 these 205 disparity studies and the other
21 data that you looked at as -- I guess you
22 might say as an extra added bonus, I tried
23 to also where I could look at results
24 similarly for those NAICS codes that
25 appear to correspond generally to the

1 justify a preference program in a
2 different market?

3 A. It's never been my job to
4 justify any preference program. That is
5 the job for policymakers and/or the
6 courts. All I'm trying to do is assemble
7 the best evidence that I can to assist in
8 those kind of determinations.

9 Q. Okay. So I'll ask another
10 question which I think I now know the
11 answer to, but -- and so is it your
12 opinion that a disparity in one racial or
13 ethnic group can be used to justify a
14 preference for a different racial or
15 ethnic group?

16 A. Yeah, I would give you the same
17 answer.

18 Q. Let's look at table 2.8. I
19 think I asked before whether the NERA
20 studies covered 11 states. That was my
21 count. Did you -- have you of an -- now
22 that the report is in front of you, can
23 you verify that that's the case?

24 A. I can try.

25 Q. Well, I'll give you the ones

1 that I found and you can correct me, how
2 about that. Florida was included. There
3 were several --

4 A. I'd prefer to --

5 Q. Count them yourself?

6 A. I'm sorry?

7 Q. You want to count them yourself?

8 A. Yeah, I said that would just
9 make it harder.

10 Q. Good. Good.

11 A. Yeah, I get 11 as well.

12 Q. Okay. Good. Let me just go
13 through a few of those. For the state of
14 Florida there was just one study of
15 Broward county; is that right?

16 A. That's right.

17 Q. And the last year under study
18 was 2009?

19 A. Where did it go? For the
20 contracting data in the study, yes.

21 Q. Was there any other kind of
22 data besides --

23 A. There was census data, small
24 business, surveys of business owners data,
25 but the study period in that table is

1 referring to the contracting statistics
2 that the availability and utilization
3 statistics would have been pulled from.

4 Q. Okay. And there was only one
5 study by NERA in Hawaii, right, the Hawaii
6 Department of Transportation study?

7 A. Yep.

8 Q. And the last year under study
9 for the contracting data in that study was
10 2008?

11 A. Yes.

12 Q. And then for Minnesota there
13 was, again, just one NERA study for the
14 city of Minneapolis; is that right?

15 A. Yes.

16 Q. Ant last year under study for
17 the contracting data for that study was
18 2007?

19 A. Yep. Yes.

20 Q. And for Massachusetts -- I'm
21 sorry, not Massachusetts, Mississippi I
22 think we went over the Mississippi one.
23 There was just one NERA study and that was
24 the Jackson Municipal Airport that we
25 talked about earlier?

1 A. You missed Massachusetts.

2 Q. I didn't miss it. I'm just not
3 asking about it.

4 A. Oh, I see. So you're asking
5 about Mississippi?

6 Q. Right.

7 A. And the question was?

8 Q. There's just the one study of
9 the Jackson Municipal Airport by NERA?

10 A. Yes.

11 Q. And the last year under study
12 for the contracting data for that study
13 was 2010?

14 A. Yes.

15 Q. Okay. And Missouri there was
16 just one NERA study, correct?

17 A. Yes.

18 Q. And the last year under study
19 for the contracting data for that study
20 was 2009?

21 A. Yes.

22 Q. And for the -- we had two
23 studies by NERA for some part of the state
24 of Ohio, correct?

25 A. Yes.

1 Q. And the last year under study
2 for the contracting data for those two
3 studies was 2008 and 2010; is that right?

4 A. Yes.

5 Q. And I skipped New York, didn't
6 I? But NERA only had one study of the
7 state of New York; is that right?

8 A. Yes.

9 Q. And the last year under study
10 for that -- sorry, let me try again. The
11 last year for the contracting data under
12 that study was 2008, right?

13 A. Yes.

14 Q. And then finally NERA had just
15 one study in any part of the state of
16 Tennessee; is that right? The
17 Memphis-Shelby County Airport Authority?

18 A. Yes.

19 Q. The last year under study for
20 the contracting data for that study was
21 2011?

22 A. Yes.

23 Q. Okay. All right. Good. Let's
24 go back to table 2.8. So in table 2.8
25 were any of these numbers assessed for

1 statistical significance?

2 A. Some of them probably were, but
3 that's not presented in the table.

4 Q. And I take it all of the NERA
5 studies that are included in table 2.8 at
6 least use the same methodology for
7 calculating disparity indexes or ratios;
8 is that right? I'm sorry.

9 A. Is all the NERA studies?

10 Q. Sorry?

11 A. The same methodology --

12 Q. There were 21 NERA studies
13 included in table 2.8, right?

14 A. No. I don't know if all 21
15 studies had those particular categories
16 but that would be the most that could be
17 and -- but all the NERA studies use,
18 basically, the same approach to measuring
19 disparity.

20 Q. That's what I was asking. Thank
21 you. So -- and just make sure I
22 understand the numbers here. In the
23 employment services category there was
24 54 percent of the disparities for
25 minorities were less than a hundred and

1 61 percent of the disparities for
2 nonminorities males were less than a
3 hundred; is that right?

4 A. That is correct.

5 Q. I think you've sort of answered
6 this before but I'm going to ask it
7 anyway, does any of the underlying studies
8 for table 2.8 account for any other
9 factors that may account for the
10 disparities, like capacity?

11 A. What do you mean by "capacity"?

12 Q. The ability of a firm to do
13 larger contracts?

14 A. Measured how? No.

15 Q. You may not have -- you may have
16 decided not to measure it. I'm just
17 asking whether you made any effort to do
18 so?

19 A. I don't know that it could be
20 measured but that is not part of our
21 availability measure.

22 Q. Okay. All right. When you did
23 the coding, you did do coding for
24 nonminority, women-owned companies,
25 correct?

1 A. I pulled out data for everybody
2 from the reports.

3 Q. Right.

4 A. So I -- yes.

5 Q. Okay. So why didn't you include
6 observations including nonminority,
7 female-owned companies in tables 2.2
8 through 2.8?

9 A. My understanding is they're not
10 relevant to the 8(a) program.

11 Q. So I guess the question I want
12 to ask as a follow up is this: When you
13 see disparities in a group that includes
14 women, how do you know that disparities
15 are not caused by sex instead of race?

16 A. Not sure I understand the
17 question.

18 Q. Okay. Let me see if I can think
19 of a better way to phrase it. Let me try
20 it this way: So when you see in table 2.2
21 that there was a 78 percent of the
22 disparities that you observed for Asians
23 were less than or equal to 80 whereas only
24 7 percent of the disparities you observed
25 for nonminority males were less than or

1 equal to 80, how do you know that isn't
2 caused by the fact that there's
3 discrimination against woman-owned firms,
4 which were included in the Asian category
5 but not in the nonminority male category?

6 A. Because then the -- my
7 regression analyses in the final section
8 of the document would show coefficients
9 that are neither large or adverse nor
10 insignificant for minorities and the
11 opposite for by sex and they do not. I'll
12 leave it at that.

13 Q. That's fine, but I just
14 want -- let's say I didn't have those
15 other parts of your study, how would I
16 know that the differences that we're
17 seeing here in the numbers weren't caused
18 by the inclusion of woman-owned firms in
19 the Asian categories and their exclusion
20 in the nonminority male category?

21 A. I think that's exactly how you
22 do know is you turn to other evidence that
23 allows you to tease out those factors.

24 Q. Okay. But this by itself
25 wouldn't tell you that?

1 A. Not explicitly, no.

2 Q. Okay. Very good. So I just
3 want to go back to footnote 31 and one of
4 the things you said here in footnote 31 on
5 page 20 is that most of the studies you
6 viewed did not distinguish between Asian
7 Pacific and subcontinent Asian. And so
8 you combined the two of them, right?

9 A. Yes.

10 Q. So in this part of the study we
11 wouldn't be able to determine whether or
12 not those disparities that you observed
13 for Asians in general were caused by
14 disparities as to one of those groups
15 rather than the other?

16 A. If you did -- if you're just
17 applying tunnel vision to look at that one
18 statistic, no, but again that's why I
19 turned to other data to tease out those
20 differences to try to answer that question
21 to see if, in fact, it's only subcontinent
22 Asians that are facing discrimination and
23 Asian Pacific don't face any
24 discrimination at all, and what you find
25 is when you look at data that can break

1 that out is that's not the case.

2 Q. Okay. But again just to be
3 clear the -- this part of the study
4 doesn't help us do that?

5 A. No.

6 Q. Okay. And you included Alaskan
7 natives, Native Hawaiians and American
8 Indians in your category called Native
9 Americans; is that right, it is part of
10 the study?

11 A. No, I think it would have -- if
12 a given disparity study had a category for
13 Native Americans, I took that as however
14 they defined it in that study.

15 Q. Well, if they had a category for
16 Native Hawaiians though, you would have
17 included it under Native Americans; is
18 that right?

19 A. Well, not necessarily because
20 depending on the government entity you're
21 looking at Native Hawaiians as that
22 specific example sometimes are classified
23 in the Asian Pacific category and
24 sometimes are classified in the Native
25 American category.

1 Q. Right. But what I'm asking is
2 what you did. If you saw an underlying
3 disparity study that had a separate
4 category and disparity analysis for Native
5 Hawaiians, how would you characterize it
6 for purposes of, say, table 2.2?

7 A. I would have to go back and
8 check. As I sit here I couldn't tell you
9 exactly whether that went into the Asian
10 category or the Native American category.
11 I'd have to check.

12 Q. Okay. And how about the same
13 question for Alaska natives --

14 A. Alaska native -- I'm sorry.

15 Q. If you saw a disparity study
16 that had a specific disparity for Alaska
17 natives, how would you characterize it for
18 purposes of table 2.2?

19 A. That would be in the Native
20 American category.

21 Q. Very good. So in your opinion
22 does the data in these tables, this part
23 of the study reflect discrimination by the
24 government entities studied in the
25 underling individual disparity studies?

1 Mischaracterizes his prior testimony.

2 MR. ROSMAN: I'm not trying to
3 mischaracterize it. I'm just asking a
4 question and putting a question mark
5 at the end of it.

6 A. The disparities don't tell you
7 whether the -- the disparities you're
8 seeing are specific individual actors
9 inside the government or outside the
10 government causing them or larger
11 institutional forces causing them or both
12 or actors in the private sector, not
13 naming names as the case may be.

14 Q. And the same would hold true
15 about the federal government, is that
16 right, you wouldn't be able to make any
17 determination about whether or not the
18 federal government was discriminating
19 based on the analysis in part one of your
20 report?

21 A. I don't think that's ever the
22 purpose of any of these disparity studies,
23 but I -- so I would say that's correct.

24 MR. ROSMAN: So this is not an
25 actual terrible time for we here on

1 I didn't -- you know, I -- you'd really
2 have to go to the census bureau to get a
3 definitive answer on that.

4 Q. Let me rephrase the question.
5 You don't know whether the census bureau
6 does anything to check the accuracy of the
7 response on how one capitalizes one's
8 business; is that right?

9 A. That's not right. I'd have to
10 refer myself to the methodology documents
11 that are out there that detail exactly how
12 these surveys are done and what checks
13 there are. They do all kinds of quality
14 control checks.

15 Whether you're trying to suggest
16 whether somebody lies on the survey and
17 can the census figure that out, I don't
18 know.

19 Q. So let me just -- I had some
20 questions about some of the tables in this
21 part of the report. I don't think they'll
22 take terribly long. In your footnote 47
23 on page 39 I believe you indicated that
24 Native Hawaiians, Asians, Pacific
25 Islanders and subcontinent Asians are all

1 grouped together in the two surveys that
2 are part of this -- part of your report.
3 Did I understand that correctly?

4 A. If you said Native Hawaiians,
5 Asians and Pacific Islanders and
6 subcontinent Asians are grouped together
7 as Pacific Islanders, that's correct.

8 Q. Okay. So if you can go to table
9 3.1?

10 A. All right.

11 Q. In this table Asians are given
12 one line and Native Hawaiians and Pacific
13 Islanders are given another line.

14 A. Yes.

15 Q. And I'm --

16 (Whereupon, simultaneous
17 conversation took place disrupting the
18 record and the court reporter
19 requested one person speak at a time
20 without interruption from anyone
21 else.)

22 Q. So I'm asking how you separated
23 out Asians from Native Hawaiians and
24 Pacific Islanders in your chart in table
25 3.1?

1 A. I did that because the SBO does
2 it that way. So I missed -- I think I
3 misspoke earlier about that footnote, what
4 was the footnote?

5 Q. Well, why don't you read the
6 footnote and tell me whether it's accurate
7 or inaccurate?

8 A. Native Hawaiians and Pacific
9 Islanders are presented as a distinct
10 category in the SBO.

11 Q. Let me --

12 A. Right. Because you've got
13 Asians -- in table 3.1 there's an Asian
14 category and there's a Pacific Islanders
15 category. The Pacific Islanders category
16 also has Native Hawaiians.

17 So if you were to combine that
18 into Asians and Pacific Islanders
19 together, but they're presented in the SBO
20 as separate line items. So it may be the
21 phrasing in footnote 47 was a bit
22 inartful, but this is how it's broken out
23 in the SBO.

24 Q. What was inartful about footnote
25 47?

1 A. Well, as I read it here it seems
2 to suggest that I got one category that's
3 Asians and Pacific Islanders that includes
4 Native Hawaiians, but I've actually got
5 two line items for that in table 3.1. I
6 have a line item for Asians and a line
7 item for Native Hawaiians and Pacific
8 Islanders.

9 Q. Okay. So it's not the case as
10 it says in footnote 47 the Native
11 Hawaiians are grouped with Asians; is that
12 right?

13 A. Well, they're grouped with
14 Pacific Islanders. What I was trying to
15 do was differentiate it from the 8(a)
16 categories where Native Hawaiians are
17 included among the Native American
18 grouping.

19 Q. Right. I understand. I'm just
20 trying to make sure I understand your
21 testimony. Footnote 47 says Native
22 Hawaiians are grouped with Asians, but I
23 think if I understand your testimony now
24 you're saying that that's not the case?

25 A. Right. I think I would have

1 been more accurate to say Native Hawaiians
2 are grouped with Pacific Islanders and
3 Pacific Islanders are frequently grouped
4 with Asians in a lot of other government
5 data.

6 Q. Well, I understand, but we're
7 talking about the SBO right now. Okay.
8 So in the next sentence subcontinent
9 Asians are grouped with Asians and Pacific
10 Islanders, is that also incorrect at least
11 insofar as it refers to Pacific Islanders?

12 A. I would say the better way to
13 state footnote 47 would be to say in the
14 SBO and ADS Native Hawaiians are grouped
15 with Pacific Islanders rather than with
16 Native Americans, also subcontinent Asians
17 are grouped with Asians rather than
18 classified separately.

19 Q. Okay. So if you could just turn
20 to page 40 of your report under A dot one,
21 economy wide results. There's a number of
22 references in this part to a table three,
23 which I could not find. So is that an
24 error? So you look, for example, in the
25 second line of the second paragraph?

1 all firms category those kinds of firms
2 are not included?

3 A. Yeah. If I've left something
4 out of the denominator, I leave it out the
5 numerator too. So yes.

6 Q. Well, but if you -- before we
7 leave the numerator/denominator topic. If
8 we add the -- in panel B if we add those
9 percentages, they come out to about
10 75 percent, right?

11 A. Not added them, but
12 that's -- it's not because of the
13 exclusion of the firms listed in item two
14 of the footnote.

15 Q. Okay. What is it attributable
16 to?

17 A. I probably -- line item for
18 women is not there.

19 Q. Okay.

20 A. Or for nonminority women.
21 Excuse me.

22 Q. Say it again?

23 A. The line item for females is not
24 there.

25 Q. Okay. And does that, you think,

1 constitute most or all of the firms that
2 are included in all firms but not listed
3 in a line item?

4 A. Most but not all. They also
5 have a category for equally male/female
6 owned, equally minority/nonminority owned,
7 those are pretty small bits and they're
8 not broken out there either.

9 Q. Did you do any calculations for
10 the equally minority/nonminority owned
11 firms?

12 A. No, not for this table.

13 Q. Do you recall approximately what
14 percentage of all firms they constituted?

15 A. Some -- a very small number, but
16 I couldn't tell you exactly what.

17 Q. Was it larger than Native
18 Hawaiians and Pacific Islanders or
19 smaller?

20 A. I couldn't say as I sit here.

21 Q. Okay. Was it -- okay. And I
22 assume you'd give me the same answer if I
23 asked you whether it was larger or smaller
24 than the American Indian and the Alaska
25 Native category?

1 women, period, and not nonminority women.

2 Q. Okay. Well, I guess I have the
3 same -- let me just make sure I understand
4 it. Women-owned firms -- a firm owned by
5 Hispanic woman would be included in the
6 Hispanic category?

7 A. Yes.

8 Q. And so if we included the all
9 women firm it would add up to something
10 more than 100 percent?

11 A. I think that's right.

12 Q. So and -- well, I guess you're
13 going to have the same question I asked
14 before which is, how do we know from this
15 chart that any disparities that you see
16 are not attributable to sex?

17 A. Well, you're free to look at
18 this chart in isolation. That's not how I
19 did it. As an economist the document I
20 look at as a whole. It's a good question
21 and one I try to tackle directly in the
22 next section.

23 Q. Okay. So the last part of the
24 footnote says that, N-A indicates the data
25 was not disclosed due to confidentiality

1 ability to do a job as capacity because of
2 your capital or your number of employees
3 or something like that. So let's call it
4 ability to do the job and define it that
5 way.

6 A. Well, there's a number of
7 columns in this table that speak to that.
8 There's -- it shows you firms -- column
9 three is just firms with paid employees as
10 opposed to column one, which is all firms;
11 column five shows you the number of
12 employees; column six shows the payroll
13 levels. So there's all kinds of...

14 Q. Maybe I need to rephrase the
15 question then. The disparity indices
16 don't take that into account though,
17 right?

18 A. The some -- vague idea of the
19 ability to do work, no.

20 Q. Okay. Well, I mean let me give
21 you an example. Your -- by the way before
22 I do that, panel C says these are
23 disparity ratios. Can you tell me why you
24 put disparity ratios instead of disparity
25 indices?

1 Q. And we are still omitting about
2 28 percent of the firms in all firms the
3 individual line item breakouts?

4 A. Yes. For the same exact
5 reasons.

6 Q. Presumably most of them are
7 going to be women-owned firms?

8 A. Yes.

9 Q. And again there's no -- there's
10 no control for the size of the firm in
11 this data, right?

12 A. Yes. The same answer for the
13 other table. I mean it's very similar and
14 I think I might have an answer for your
15 earlier question here in a minute. Yes.
16 That stray reference to table six should
17 have said table 3.3.

18 O. Thank you.

19 | (Whereupon, a recess was taken.)

20 Q. Dr. Wainwright, can you just
21 explain what PUMS data is?

22 A. Yes. Different census sources
23 can have PUMS data. PUMS means public use
24 microdata sample and so there is a PUMS
25 sample from the SBO. There's a PUMS

1 sample in the American community survey
2 but it's -- the important part is the M
3 for microdata. It's individual level data
4 taken from a larger survey.

5 Q. This is also from the census
6 bureau, right?

7 A. Yeah, I don't know what
8 particular reference you're seeing but
9 yes.

10 Q. Okay. So there were three parts
11 to your last section of your report
12 dealing with salary and wages, business
13 formation and business earnings. Let's
14 start with salary and wages.

15 How do you understand the
16 relevance of salary and wages to
17 contracting issues that are relevant to
18 this case?

19 A. As -- I'm a labor economist by
20 training and many business owners move up
21 through the ranks in the company. So a
22 construction contractor may have started
23 out as a laborer and become a foreman so
24 these are -- business ownership is an
25 occupation within the labor market in a

1 way.

2 So it is -- it's just a way to
3 create a forward picture of where these
4 disparities exist and what factors do and
5 do not explain them, but that really is
6 -- the main reason is that moving up
7 through occupational hierarchies in
8 different industries often leads
9 to -- business ownership is often the end
10 stage of that.

11 So if there's -- if there's
12 discrimination at lower levels that can
13 suppress the emergence of business owners.

14 Q. And the disparities that you
15 have identified with respect to salaries
16 and wages in this part of your report, do
17 you think they reflect any specific kind
18 of discrimination?

19 A. No. I think they reflect an
20 amalgam of all -- can -- you know, you
21 remember in this first section we're
22 looking at unadjusted disparities, but
23 they can -- what we're looking at here is
24 the end result.

25 They can -- they could reflect

1 discrimination in a variety of arenas, but
2 particularly in the labor market.

3 Q. So when you say in the labor
4 market, you mean by employers?

5 A. Well, not all discrimination is
6 by individuals, but it could -- you've got
7 job training programs, you've got
8 government programs that affect the labor
9 market, you've got specific employers,
10 you've got customers. So yes but not
11 exclusively employers.

12 Q. Okay. With respect to business
13 formation, how do you control for an
14 individual's desire to own a business, if
15 you can?

16 A. I have no measurement of desire.

17 Q. You think that's an important
18 omission?

19 A. If there were reason to believe
20 that minorities and nonminorities were
21 substantially different in being desirous
22 to own businesses, possibly. I'm aware of
23 no research to that effect, but it's not
24 something I can measure.

25 Q. Okay. Is it fair to

1 assume -- let me start again.

2 Is it fair to say that you
3 assumed that the desire to own a business
4 was consistent across the various races
5 that you studied?

6 A. I would put it -- that's close.
7 I would put it somewhat different. I have
8 no reason to assume they should differ in
9 any -- you know, from individual to
10 individual, yes, but should they differ by
11 race, I have no reason or evidence to
12 suggest that they should or do.

13 Q. Do you think the disparities
14 that you identified in business formation
15 reflect any kind of specific
16 discrimination?

17 A. I'm not testing for specific
18 kinds of discrimination. As an economist
19 what I'm trying do is look to see if
20 there's quantitative differences in
21 economic outcomes by race that aren't
22 accounted for by differences in
23 productivity, such as endowments of
24 human capital and financial capital.

25 But which specific actors or

1 because it's your total earnings for the
2 year. So to also control for weeks and
3 hours would not be correct.

4 Q. I'm not sure I understand. So
5 I'll ask the question in a different way.

6 If somebody is only working half
7 time for their business, that might
8 explain why they're only earning half as
9 much money, right?

10 A. That would be reflected in their
11 annual figure.

12 Q. Right. And so including it as
13 an independent variable might help explain
14 some of the variation in their annual
15 figures, right?

16 A. I'd have to give that some more
17 thought, but I think because it's already
18 built into the annual earnings figure that
19 it would be inappropriate to also control
20 for weeks or hours but that's a question
21 I'd have to give some more very specific
22 thought to.

23 Q. I take it you didn't include
24 that data point in your regression
25 analysis; is that right?

1 A. Hours and weeks were not a -- on
2 the right-hand side of the equation,
3 that's correct.

4 Q. Okay. You also -- you used age
5 as a substitute for experience; is that
6 right?

7 A. Yes. There's a proxy.

8 Q. Well, isn't it the case that
9 people of different ages can
10 have -- excuse me -- people of the same
11 age can have vastly different amounts of
12 experience in a particular field?

13 A. Sure. That's why it's a proxy
14 and not -- there's no measure of actual
15 experience. Just like a measure of desire
16 to own a business, that I'm aware of, and
17 certainly not in the PUMS data.

18 Q. Okay. So there -- if I just go
19 to the charts, you can look at any of the
20 tables, it doesn't really matter, there's
21 a lot of statistical significance here, a
22 lot of numbers that have very high
23 statistical significance.

24 And my question is: Is that a
25 reflection of the large numbers of

1 observations that would -- that you
2 managed to collect for purposes of these
3 tables?

4 A. In part, yes. It's a very large
5 data set.

6 Q. In the PUMS analysis in all
7 three categories that you examined, can
8 you tell us who you think is doing the
9 discriminating that causes the
10 disparities?

11 MS. DINAN: Objection. Calls
12 for speculation.

13 A. Oh, I was going to say asked and
14 answered. I thought that's been asked
15 before and I cannot.

16 Q. I asked with respect to specific
17 parts and now I'm just trying to sort of
18 wrap up here.

19 A. No. I can't and again if it's a
20 culmination of overdiscrimination (sic) by
21 individual actors or more institutional
22 discrimination through social and economic
23 mechanisms or all of the above may be the
24 case, but I can't pinpoint that with this
25 data.

done and I will turn the witness over to you, but I would like to take five minutes at this point to just review.

4 MS. DINAN: Yeah, I'd like to do
5 the same if you're about to turn over
6 to -- examination. So --

13 Q. So in your PUMS analysis you
14 excluded Hispanic whites from your white
15 category; is that right?

16 A. The nonminority category is
17 non-Hispanic. So yes, I think that's
18 right.

19 Q. Okay. Why?

20 A. Primarily because Hispanic is
21 one of the reference categories in the
22 8(a) program --

23 Q. You were trying to establish
24 whether there were distinctions
25 between --

1 A. I'm sorry. I wasn't quite
2 finished.

3 Q. Oh, I'm sorry.

4 A. You can't have them in both
5 categories.

6 Q. Okay. But if you're trying to
7 establish a difference in race, don't you
8 want all the people of a given race in the
9 race category?

10 A. It's race and ethnicity and in
11 almost all of these disparity studies and
12 all the work I've ever done, they're
13 fairly standard categories; African
14 Americans, Hispanic, Asians, Native
15 Americans, there might be some minor
16 definitional differences between studies
17 here and there, but those are the main
18 categories, and those are the categories
19 captured for preferences in the 8(a)
20 program.

21 So I tried to follow those
22 definitions where the data would allow me
23 to as we saw in the middle section of the
24 report. For example, in the SBO Native
25 Hawaiians are grouped in a different

CERTIFICATION

I, Garry J. Torres, a Notary Public
for and within the State of New York, do
hereby certify:

6 That, Dr. Jon Wainwright, the witness
7 whose testimony as herein set forth, was
8 duly sworn by me; and that the within
9 transcript is a true record of the
10 testimony given by said witness.

11 I further certify that I am not
12 related to any of the parties to this
13 action by blood or marriage, and that I am
14 in no way interested in the outcome of
15 this matter.

16 IN WITNESS WHEREOF, I have hereunto
17 set my hand this 17th day of March, 2022.



GARRY J. TORRES

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ERRATA

p12

line 2 midwest fence should be Midwest Fence

line 3 disadvantaged business enterprise should be Disadvantaged Business Enterprise

line 15 Rothy should be Roth throughout

line 23 Rothy Two should be Rothe II

p13

line 10 DV should be DC

p14

lines 22-23 Cossman should be Kossman

p23

line 5 defendant's expert should be defendant's expert report

p27

lines 21-22 Econ Salt should be Econsult

p34

line 18 alluded should be eluded

p42

line 4 subanalysis should be subanalyses

line 14 MBB should be MBE

p43

line 8 the total should be that total

line 14 MBA should be MBE

p60

line 50 procontractor should be prime contractor

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line 60 Prince George should be Prince George's

line 25 interest or should should be interest should

p66

line 9 consensus should be custom census

p67

line 24 minority should be minorities

p69

line 2 consultants should be consultants'

line 19 could should be could have

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line 8 DOJ should be did DOJ

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line 14 ADS should be ABS

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line 10 business should be census

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line 7 clients should be client's

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line 1 American community survey should be American Community Survey

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Lowery should be Lowrey throughout

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Fairley should be Fairlie throughout

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line 3 interest in dividence should be interest and dividend

p157

lines 17-18 bureau of labor statistics should be Bureau of Labor Statistics

lines 21-23 bureau of labor statistics should be Bureau of Labor Statistics,

bureau of economic analysis should be Bureau of Economic Analysis, census bureau should be Census Bureau

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line 5 census bureau should be Census Bureau

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line 7 ethic should be ethnic

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line 11 union that should be union or

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line 10 it's should be it

line 19 factor could should be factor that could